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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: The Pevar Company--Claim for Costs

File: B-242353.3

Date: September 1, 1992

Bernard L. Shapiro, Esq., Rubin, Shapiro & Weisse, for the protester.
Lt. Col. William H. Spindle, Department of the Air Force, for the agency.
Jennifer Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is entitled to reimbursement for time spent by its employees in preparing the proposal and in pursuing the protest at employees' actual rates of compensation, plus reasonable overhead and fringe benefits.

2. Protester is not entitled to recover the proposal preparation costs of its subcontractors where there is no evidence that the protester and the subcontractors acted as a team throughout the bidding process.

3. Under Bid Protest Regulations in effect at the time the protester filed its protest, the protester is not entitled to recover the costs of pursuing its claim for protest costs.

4. Protester is not entitled to reimbursement for the time spent by its employees and attorneys pursuing federal court review of the agency decision not to suspend contract performance pending resolution of the protest.

DECISION

The Pevar Company requests that we determine the amount that it is entitled to recover from the Department of the Air Force for proposal preparation costs under request for proposals (RFP) No. F07603-91-R-8201, and for the costs of filing and pursuing its protest in Pevar Co., B-242353.2, Apr. 25, 1991, 91-1 CPD ¶ 407. As discussed below, we find that Pevar is entitled to recover $16,216 in proposal preparation and protest costs.

In our prior decision, we sustained Pevar's protest of the award to Bildon, Inc. of a contract for the design and construction of a shed roof over loading docks extending from the aerial freight terminal at Dover Air Force Base, Delaware. We found that by awarding to Bildon, which had proposed a design incorporating purlins as a method of structural support rather than the bar joists called for in the solicitation, the agency had effectively relaxed the specification and indicated that the RFP had overstated its minimum needs. Since work on the project had already been completed, we could not recommend amendment of the solicitation and a reopening of the competition; we therefore found that Pevar was entitled to its proposal preparation costs and the costs of filing and pursuing its protest, including attorneys' fees.

On August 7, 1991, Pevar submitted a claim to the agency for costs which totaled $94,782, consisting of $59,080 in proposal preparation costs and $35,702 in protest costs. After auditing Pevar's claim and disallowing or adjusting a number of the claimed expenditures, the Air Force offered Pevar a settlement of $28,044.17. Pevar refused the offer and submitted the claim to our Office for resolution. In its claim to our Office, Pevar seeks to recover, in addition to its original claim of $94,782, the costs of filing and pursuing its claim before the agency and to our Office.

As a preliminary matter, the Air Force requests that we dismiss Pevar's claim as untimely. The agency maintains that Pevar has forfeited its right to recover its costs because it failed to file its agency-level claim within 60 days after its receipt of our decision on the protest, as required by our Bid Protest Regulations. In this regard, our current Regulations provide that:

> "The protester shall file its claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 60 days after receipt of the decision on the protest or the declaration of entitlement to costs. Failure to file the claim within such time shall result in forfeiture of the protester's right to recover its costs." 4 C.F.R. § 21.6(f)(1) (1992).

Although the agency is correct that our current Regulations require that a claim for costs be filed within 60 days after receipt of our decision, these Regulations were not in effect at the time Pevar filed its protest on December 31,

1990.[1] The Regulations then in effect, 4 C.F.R. § 21.6(e) (1990), included no limitation on the time period for filing an agency-level claim for costs. We therefore decline to dismiss Pevar's claim as untimely.

Proposal Preparation costs

Pevar seeks to recover $26,259 for its own proposal preparation costs and $32,821 for the proposal preparation costs incurred by its four principal subcontractors. With regard to its own costs, Pevar claims labor expenses of $10,601 for 4 company employees, including the company president, whom it claims worked 189.5 hours on the proposal. Pevar also claims $11,291 in general and administrative (G&A) expenses; $3,498 for payroll taxes and insurance; $146 for travel expenses; and $722 for other direct expenses incurred in preparing the proposal.[2] The agency disputes both the number of hours that Pevar claims its president worked on the proposal and his claimed rate of compensation. The agency also objects to Pevar's methodology for computing G&A expenses and payroll taxes and insurance.

Pevar claims that its president worked a total of 189.5 hours in preparing its proposal, including 73 hours of overtime. According to Pevar, its president worked longer than a standard 8-hour day on 11 occasions, including four 10-hour days, one 13-hour day, three 16-hour days, and three 20-hour days. It claims a rate of compensation of $39.40/hour for his straight time and an overtime rate of $59.10 (1 1/2 times the straight time rate) for hours in excess of 8 per day. Pevar explains that it derived the straight time rate by taking the president's annual salary of $60,000, plus his fringe benefits valued at $4,940, and dividing the total by 2,080 (52 weeks x 40 hours/week). This computation yielded an hourly rate of $31.23, to which it then added 25 percent as a reasonable overhead and profit burden.

The Defense Contract Audit Agency (DCAA), which audited Pevar's claim, took issue with this methodology. According to DCAA, the appropriate methodology for determining the president's hourly rate would be to divide the president's weekly salary of $1,153.85 by the number of hours that he

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[1]The revised Regulations, which were promulgated on January 31, 1991, apply to protests filed after April 1, 1991. Hadson Defense Sys., Inc.--Claim for Protest Costs, B-227285.8, Mar. 13, 1991, 91-1 CPD ¶ 274.

[2]There is a discrepancy of $1 between the sum of these items ($26,258) and the total claim by Pevar ($26,259), which is attributable to rounding.

worked in any given week; this figure would then be multiplied by the number of hours that the president worked on the proposal during that week. For example, for the week of December 3 through December 9, the agency calculated that the president worked a total of 88 hours (72.25 on the proposal and 15.75 on other activities). It therefore calculated his hourly rate as $13.11, which it then multiplied by 72.25.

Pevar has submitted no evidence to establish that its president's compensation plan provides for payment of overtime when the president works in excess of a 40-hour week. Nor has it justified its addition of an overhead/profit burden rate of 25 percent to its president's hourly rate. In this regard, we note that Pevar has requested reimbursement for overhead elsewhere in its claim and that it may not recover profit on its own employees' time. Claimed rates must be based upon actual rates of compensation plus reasonable overhead and fringe benefits, and not upon market rates, which include profit. John Peeples--Claim for Costs, 70 Comp. Gen. 661 (1991), 91-2 CPD ¶ 125.

Although Pevar's accountant takes issue generally with DCAA's method of computing the rate of compensation, he does not explain in any detail why that method is inappropriate. In fact, DCAA's "full time accounting" methodology is specifically identified in the DCAA Audit Manual as an appropriate method for accounting for excess hours worked by salaried employees. DCAA Contract Audit Manual, ¶ 6-410.4 (July 1990). In contrast, it appears that using Pevar's method, the company in effect would be reimbursed at a rate in excess of the President's annual salary.[3] Accordingly, we conclude that the methodology proposed by DCAA should be used to calculate the rate at which Pevar is to be reimbursed for its president's time. Thus, using the hourly rates calculated by DCAA, we find that Pevar is entitled to recover $2,922 for its president's labor, a sum which we derived as follows:

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[3]For example, based on his annual salary divided by a 52-week work year, the president's weekly compensation is $1,153. Using Pevar's method, if the president worked 50 hours in one week, the company would be reimbursed a total of $2,166 (40 hours x $39.40 "straight time" rate, plus 10 hours x $59.10 overtime rate).

Week	Hours	Rate	Total
Dec. 3-9	72.25	13.11	947
Dec. 10-16	77.00	12.82	987
Dec. 17-23	40.00	24.55	982
Dec. 24	.25	23.55	6
Total:	189.50		2,922

The agency does not dispute the number of hours or the rates of compensation claimed for the other three Pevar employees: the designated project superintendent, who worked 4 hours at a rate of $23.32/hour; the designated assistant project manager (and company estimator), who worked 62.75 hours of straight time at $15.63/hour and 10 hours of overtime at $23.45/hour; and the company secretary, who worked 47 hours of straight time at $8.00/hour and 1 hour of overtime at $12.00/hour. Thus, we find that in addition to the $3,755 for its president's time, Pevar is entitled to $93 for its superintendent's time; $1,215 for the assistant project manager's time; and $388 for its secretary's time--or a total of $4,618. We also find that Pevar is entitled to $146 for travel expenses (696 miles driven, at $.21/mile) associated with proposal preparation and $722 for other direct expenses relating to preparation of the proposal, including photocopying, delivery services, and engineering services, to which the agency does not take exception.

The agency also disputes Pevar's claim for $3,498 (33 percent of the $10,601 in labor expenses claimed by Pevar) for payroll taxes and insurance. The agency objects to the application of a 33 percent rate based on an audit of the Pevar Company's books and records by DCAA, which revealed that for calendar year 1990, Pevar paid $58,584 in payroll taxes and insurance, while spending $341,415 for direct and indirect labor. DCAA thus calculated that Pevar's burden rate was 17.16 percent of its labor cost.

Pevar's accountant takes issue with DCAA's inclusion of direct labor costs in the above base. The accountant contends that since all of the labor for which Pevar is seeking reimbursement was indirect (i.e., management or administrative), only indirect labor should have been included in the base. The accountant also objects to DCAA's failure to include all employee benefits in its recommended pool of costs (the numerator in the above calculation), although he does not specifically identify the additional benefits to which he refers. According to Pevar's accountant, Pevar's costs on indirect labor (consisting of payroll taxes, employee benefits, and insurance) for calendar year 1990 totaled $53,914, while its base totaled

$165,743, yielding a burden rate on indirect labor of 32.53 percent.

In response to our request for an explanation of the differences between the parties' calculations of the indirect burden rate, the Air Force stated that Pevar had applied the payroll tax and insurance rates, while DCAA had verified and used the actual amounts paid by Pevar; according to the Air Force, using the rates, as Pevar did, is not appropriate because the federal and state taxes at issue apply only up to specified ceilings. The Air Force also stated that it had omitted Pevar's cost of general liability insurance from its calculation of the indirect burden rate, because it was already included in Pevar's G&A rate.

In its response to the Air Force's submission, Pevar's accountant essentially reiterated his initial argument and did not directly address the Air Force's position regarding the use of actual amounts of payroll taxes and insurance paid, or the Air Force's statement regarding the inclusion of general liability insurance in Pevar's G&A rate. Nor did the accountant explain how he calculated the unspecified "employee benefits" or why they should be included in the calculation. Given that the Air Force's explanation of its calculation of Pevar's indirect burden rate is reasonable on its face, and in view of Pevar's failure to rebut the Air Force's position or adequately substantiate its own calculations, we adopt DCAA's calculation. Thus, we find that Pevar is entitled to recover $792 for payroll taxes and insurance ($4,618 for labor x 17.16 percent = $792).

Next, the agency disputes Pevar's claim for $11,291 in G&A expenses associated with proposal preparation. The protester calculated this sum by applying a derivation of the Eichleay formula, a methodology used to allocate unabsorbed home office overhead under construction contracts where the contractor is unable to recover overhead expenses as contemplated because of compensable delay.[1] The Eichleay formula, however, is used where overhead cannot be determined by application of a percentage rate to direct costs because, as a result of the delay, there are little or no direct costs upon which overhead can be computed. See Community Htg. & Plbg. Co., Inc., ASBCA Nos. 37981, 38166, 92-2 BCA 24,070. That is not the situation in proposal preparation costs cases, and we are unaware of any case in

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[1]See Eichleay Corp., ASBCA No. 5183, 60-2 BCA 2688, recon. denied, 61-1 BCA 2894. For a general discussion of the Eichleay formula and its application, see P. Trueger, Accounting Guide for Government Contracts 156-188 (9th ed. 1988).

which this formula has been applied in calculating proposal preparation or bid protest costs. Accordingly, we decline to apply it here. If the Eichleay formula is not applied, the protester's accountant calculates that Pevar's G&A rate for 1990 was 20.83 percent; DCAA recommended a virtually identical rate of 20.20 percent. Accordingly, we find that Pevar is entitled to recover $1,307 for G&A on its proposal preparation expenses.[5]

With regard to Pevar's claim for the proposal preparation costs of its four principal subcontractors, we find that such costs are not recoverable. We have allowed the recovery of a subcontractor's proposal preparation costs in only one limited circumstance: where the prime contractor and the subcontractor were party to a long-standing teaming arrangement, pursuant to which they shared responsibility for submitting offers and where it was clear from the terms of the offer itself that the two were acting jointly. TMC, Inc.--Claim for Costs, 69 Comp. Gen. 199 (1990), 90-1 CPD ¶ 111. Here, no evidence has been presented that a long-standing teaming arrangement existed between Pevar and the subcontractors in question or that these firms joined with Pevar in making the decision to respond to this RFP or in preparing the offer. Furthermore, there is no evidence that at the time Pevar solicited their quotations, either Pevar or these firms regarded themselves as anything more than potential subcontractors. We accordingly deny Pevar's request for recovery of the proposal preparation expenses of its subcontractors.

Protest Expenses

In its claim to the Air Force, Pevar claimed $35,702 in protest expenses, consisting of $15,702 for the time and expenses incurred by its employees in pursuing the protest and $20,000 in attorneys' fees. In its subsequent claim to our Office, dated January 15, 1992, the protester requested an additional $4,727 in attorneys' fees, plus an additional unspecified sum for its own in-house expenses,[6] for the costs that it incurred in pursuing its claim before the agency. Pevar filed a third claim on March 25 for the fees and expenses incurred by its attorneys in pursuing its claim

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[5]We derived this amount by multiplying $6,278 (the sum of Pevar's labor, payroll taxes, insurance, travel expenses, and other direct expenses) by 20.83 percent.

[6]With regard to its own in-house expenses, Pevar furnished us with a chronology detailing the number of hours spent by its staff on activities related to the claim between September 1991 and January 1992; it provided us with no total, however.

to our Office, and a fourth claim on July 2 for the fees incurred by its accountant and attorneys in responding to our request for substantiation of its claimed fringe benefit and G&A rates.

First, neither the expenses that Pevar incurred in pursuing its claim for costs before the agency nor the costs that it incurred in pursuing its claim to our Office are recoverable. The cost of pursuing a protest, to which we determined Pevar to be entitled, does not include the cost of pursuing a claim for protest costs. Techniarts Eng'g--Claim for Costs, 69 Comp. Gen. 679 (1990), 90-2 CPD ¶ 152; National Test Pilot School--Claim for Costs, B-237503.4, Nov. 25, 1991, 91-2 CPD ¶ 488. Furthermore, although our Regulations now specifically authorize us to award a protester the costs of pursuing a claim for costs before our Office, 4 C.F.R. § 21.6(f)(2), these Regulations were not in effect at the time Pevar filed its protest. Under the Regulations then in effect, 4 C.F.R. § 21.6(e) (1990), such awards were not authorized. Armour of Am., Inc.--Claim for Costs, 71 Comp. Gen. 293, 92-1 CPD ¶ 257. Thus, we disallow Pevar's claims of January 15, March 25, and July 2, in their entirety.

With regard to Pevar's claim for the costs of pursuing the protest itself, we have reviewed the chronologies submitted by both the Pevar Company and its attorneys detailing the number of hours spent by Pevar personnel and the lawyers working on protest-related matters. Based on our review, we find that a number of the claimed hours cannot be allowed.

In particular, we find that Pevar is not entitled to reimbursement for the time spent by its employees and attorneys pursuing federal court review of the agency decision not to suspend contract performance pending resolution of the protest. We have previously recognized that even where a protester seeks no substantive relief from the court and continues to pursue its ultimate protest remedy from the General Accounting Office, the costs of pursuing injunctive relief from the court cannot reasonably be considered costs of filing and pursuing a protest before our Office. Diverco, Inc.--Claim for Costs, B-240639.5, May 21, 1992, 92-1 CPD ¶ 460. Thus, we disallow Pevar's claim for the time spent by its president on January 4, 5, 6, 8, and 9 assisting in the preparation of a motion for a temporary restraining order (TRO) and in attending the hearing. We also disallow Pevar's claim for 100 miles of travel by automobile and for $8.25 for parking to attend the hearing. Similarly, we disallow the protester's claim for the time spent by its attorneys on January 4 through 10, 14, and 15 researching and filing the motion for a TRO, contacting and meeting with representatives of the U.S. Attorney's Office, attending the hearing, advising the client of developments

regarding the motion, and drafting a notice of withdrawal of the complaint.

We also disallow Pevar's claim for the time and expenses (i.e., travel expenses, film, and processing) incurred by its president in taking photographs of the shed roof on March 3. The photographs were not submitted as part of the protester's post-conference comments, nor were they requested by our Office; thus, we fail to see their relevance to the protest. Further, we disallow Pevar's claim for 2 hours of its secretary's time on December 26 since its chronology does not reflect that she performed any protest-related activities that day; in addition, we disallow its claim for 1 hour of its attorneys' time on December 17 and for 3.25 hours on December 18 since the consultations between Pevar and its attorneys on these dates concerned issues other than the subject matter of this protest. (Since, according to Pevar's chronology, it did not learn that Bildon had proposed a design incorporating purlins rather than bar joists until December 27, attorney-client consultations on December 17 and 18 obviously could not have focused on this issue). We also disallow Pevar's claim for $46 for a dinner meeting with its attorneys on January 2 since such expenses are not reimbursable. Bay Tankers, Inc.--Claim for Bid Protest Costs, B-238162.4, May 31, 1991, 91-1 CPD ¶ 524.

We allow Pevar reimbursement for its remaining costs, including 78.5 hours of its president's time for a total of $2,667);[7] travel expenses of $92 (320 miles by automobile at $.21/mile, plus tolls and meals of $25); and $9 for a Federal Express charge incurred in mailing protest-related materials to its attorneys. We also find that it is entitled to $5,863 in attorneys' fees (27 hours at the partner's

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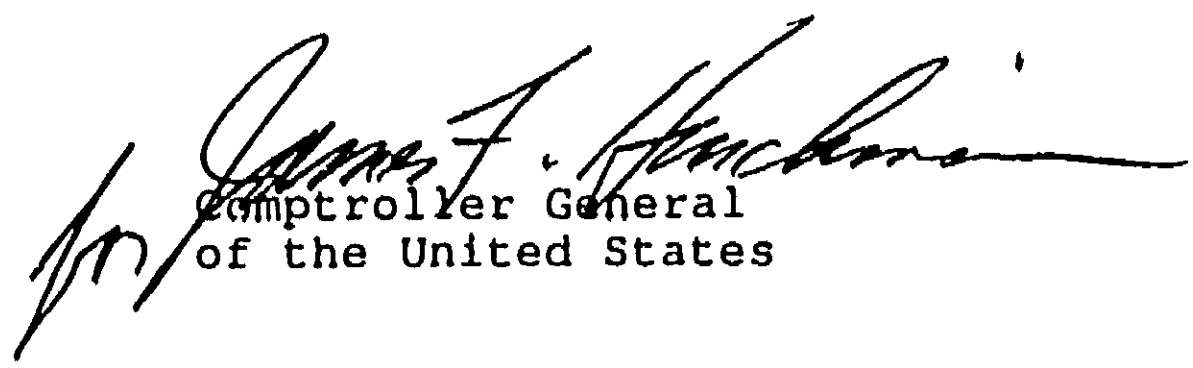
[7]We calculated the president's labor costs based on the hourly rates derived by DCAA using the full time accounting method described above with regard to proposal preparation costs. Our calculations, with the numbers rounded, are as follows: (1) December 24-December 30: 22 hours claimed x 23.55/hour = $518; (2) December 31-January 3: 24 hours claimed x 19.72/hour = $473; (3) January 7: .50 hours claimed x 28.85 = $14; (4) February 11: 12 hours claimed x 26.22 = $315; (5) February 26: 8 hours claimed x 28.85 = $231; (6) March 29: 2 hours claimed x 28.85 = $58; (7) April 5: 10 hours claimed x 27.47 = $275. This total ($1,884) was multiplied by 17.16 percent for payroll taxes and insurance, and then by 20.83 percent for G&A.

billing rate of $150/hour and 14.5 hours at the associate's billing rate of $125/hour).[8]

Conclusion

We find that Pevar may recover a total of $16,216, consisting of $7,585 in proposal preparation costs and $8,631 in protest costs.



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[8]It is not apparent from the attorneys' billing statement or accompanying chronology whether certain of the services for which reimbursement is claimed were performed by a partner or by an associate. In response to our request for a breakdown of the services, the attorneys explained that their firm's arrangement with Pevar provided for a billing rate of $150/hour regardless of the status of the attorney furnishing the services. The attorneys further noted that if they had billed for the partner's time separately from the associate's, they would have charged $125 for the associate's time and more than $150 for the partner's time (the specific amount was not identified).

Regardless of what sort of arrangement regarding billing rates Pevar may have agreed to, our Office is authorized to award only reasonable attorneys' fees, which means fees which are commensurate with the particular attorney's expertise and experience. "Reasonable" attorneys' fees would not encompass compensation for associate's time at the partner's billing rate, nor would it include reimbursement for partners at a rate in excess of the rate at which they billed their client. Thus, we find that Pevar is entitled to reimbursement at a rate of $150/hour for the time which its chronology clearly reflects as having been spent by a partner and $125/hour for the time spent by the associate. Where it is unclear whether the time involved was that of the partner or the associate, or it appears that part of the time was that of the partner and part was that of the associate, we find that Pevar is entitled to reimbursement for half the time at the partner's rate and half at the associate's rate.